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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 121

396 CORP.,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK J. DONNER,
ARTHUR KINOY,
MARSHALL PERLIN,
Attorneys for Petitioner,
342 Madison Avenue,
New York 17, N. Y.

[redacted]

INDEX

	PAGE
The Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
A. The Proceedings Below	2
B. The Evidence	4
C. The Trial Court's Opinion	6
D. Post Trial Proceedings	6
Reasons for Granting the Writ	7
Conclusion	13
APPENDIX:	
Opinion	I

Table of Cases

Bauman v. Ross, 167 U. S. 548	9
Brooklyn Eastern District Terminal v. New York, 139 F. 2d 1007 (C. A. 2)	8
Kimball Laundry Co. v. United States, 338 U. S. 1	8
United States v. Bauman, 56 F. Supp. 109 (D. C. Ore.)	8, 9
United States v. Certain Parcels of Land, 55 F. Supp. 257	8, 9
United States v. Crown Zellerbach Corp., 60 F. Supp. 853 (D. C. Ore.)	8, 9
United States v. General Motors Corp., 323 U. S. 373	7, 12

PAGE

United States v. Petty Motors Co., 327 U. S. 272 8
United States v. 70.39 Acres of Land, 164 F. Supp. 451 (D. C. Cal.) 8
United States v. 60,000 Square Feet of Certain Parcels of Land, 53 F. Supp. 767 (D. C. Cal.) 10

Authorities Cited

Fifth Amendment 7
28 U. S. C. Section 1254 2

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York awarding fair rental value for property the temporary use of which was condemned by the United States.

The Opinion Below

The opinion of the District Court (R. 329-340)* is not reported. The order of the District Court, dated March 31, 1958, denying petitioner's motion for additional compensation appears at R. 388. The opinion of the Court of Appeals is reported at 264 Fed. 2d 704 and is attached hereto (App. I, VIII).**

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* We thus refer to the joint appendix below.

** We thus refer to the appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on March 18, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

Questions Presented

1. Whether the right of the Government to elect to extend annually the use and occupancy of petitioner's premises for a total of five yearly periods constitutes the taking of a property interest in the nature of an option for which petitioner was entitled to compensation in addition to the current fair market rental value.

2. Whether the District Court in fixing the annual fair market rental value of petitioner's premises in a condemnation proceeding violated the Fifth Amendment in failing to award compensation to petitioner for the value of the Government's right to renew for additional yearly terms.

Statement of the Case

A. The Proceedings Below

Involved in this case is a condemnation of the use and occupancy of the Borgfeldt Building, located at 111 East 16th Street, County, City and State of New York.

On June 16, 1953, the United States instituted a condemnation proceeding, taking (R. 6-8),

> "* * * the use and occupancy of premises hereinafter described, for a term of years commencing July 1, 1953 and ending June 30, 1954, extendable for yearly periods thereafter until June 30, 1958, at the election of the United States, notice of which election shall be filed in the proceedings at any time prior to the end of the term taken or subsequent extensions thereof, * * *."

Thus, while the taking encompassed a five-year period, the Government's term ran for a year with the option to renew its occupancy for four additional one-year terms providing notice of such election was given thirty days prior to the termination of the current annual term.

A stipulation in 1954 fixed the rental to be paid by the Government to petitioner for the first two years of the taking and it was subsequently extended to June 30, 1956.

On April 5, 1957, an inquest was begun before the Hon. John C. Knox, Judge of the United States District Court for the Southern District of New York, for the purpose of determining the compensation to be paid by the Government to petitioner for the use and occupancy of the premises for two years commencing July 1, 1956 and terminating June 30, 1958.

Hearings were held, and on July 8, 1957, the trial court filed an opinion establishing the rental to be paid petitioner at 90 cents per square foot of floor space, or $225,000 per annum. That judgment further provided (R. 342):

> "In the event the petitioner-plaintiff does not notify the defendant-landlord on or before January 1, 1958 as to whether it will continue its tenancy beyond June 30, 1958, the defendant-landlord may apply for the fixation of a yearly rental in excess of $.90 per square foot."

On December 24, 1957, after petitioner had docketed the appeal below, the Goverument filed a notice, purporting to comply with Judge Knox's order that the Government would "continue its tenancy of the premises involved in this proceeding beyond June 30, 1958" (R. 348). Upon inquiry petitioner was advised that the notice did not constitute a commitment for an additional yearly taking (R. 354). Petitioner, therefore, moved in the court below for an order remanding the record on appeal to the district court for further proceedings (R. 349). The court below